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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

DORA JANE HORTON,
Administratrix with Will Annexed of the Estate of
J. W. EHRLICH, et al.,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
THE STATE OF CALIFORNIA, THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN AND
FOR THE COUNTY OF SAN FRANCISCO,
BYRON ARNOLD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PAUL E. RABIN
COUNSEL OF RECORD
ZENOBIA LAL-WADIA
WILLIAMS, MARTINET & RABIN
240 Stockton Street
Sixth Floor
San Francisco, CA 94108
(415) 433-0285
Attorneys for Petitioner

78P8



QUESTIONS PRESENTED

1. Whether it is a denial of equal protection to grant judicial immunity when a judge contravenes the laws created by the legislature.
2. Whether the probate judge denied petitioner equal protection of the law by applying the law unequally between person similarly situated.
3. Whether judicial immunity attaches to all categories of conduct in which a judge may engage or only to acts which are of a judicial or quasi-judicial nature.
4. Whether the court's duty under the mandatory provisions of California Probate Code Section 541 was judicial or purely ministerial.
5. Whether judicial immunity extends to situations in which a judge acts in the absence of jurisdiction and where the initiative and independence of the

judiciary is not effectively impaired.

PARTIES

The parties to the proceeding are
the same as those in the court whose
judgment is sought to be reviewed.

TABLE OF CONTENTS

	<u>Page No.</u>
QUESTIONS PRESENTED.....	i
PARTIES.....	ii
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.....	1
Opinions and Orders Below.....	1
Jurisdiction.....	2
Statutory Provisions Involved And Questions Presented.....	2
Statement of Case.....	5
Reasons for Allowance of the Writ.....	12
1. THE SUPREME COURT MAY REVIEW A FINAL JUDGMENT OR DECREE RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD BY WRIT OF CERTIORARI WHERE ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY IS SPECIALLY SET UP OR CLAIMED UNDER THE CONSTITUTION, TREATIES OR STATUTES OF, OR COMMISSION HELD OR AUTHORITY EXERCISED UNDER, THE UNITED STATES.....	12
2. IT IS A DENIAL OF EQUAL PROTECTION TO GRANT JUDICIAL IMMUNITY WHICH WOULD CONTRAVENE THE LAWS CREATED BY THE LEGISLATURE.....	14

TABLE OF CONTENTS (continued)Page No.

3. THE JUDGE ACTING UNDER COLOR OF LAW DEPRIVED PETITIONER OF THE RIGHT TO EQUAL PROTEC- TION OF THE LAWS GUARANTEED BY BOTH THE U.S. AND CALI- FORNIA CONSTITUTIONS.....	19
4. JUDICIAL IMMUNITY DOES NOT AT- TACH TO ALL CATEGORIES OF CONDUCT WHICH THE JUDGE MAY ENGAGE BUT ONLY TO THOSE ACTS WHICH ARE OF A JUDICIAL OR QUASI-JUDICIAL NATURE.....	26
5. CALIFORNIA PROBATE CODE SECTION 541 ESTABLISHES A DUTY TO SET A BOND AND LEAVES NO DISCRETION IN THE COURT WITH RESPECT TO THE MINIMUM AMOUNT OF THE BOND.....	37
6. JUDICIAL IMMUNITY DOES NOT EXTEND TO SITUATIONS WHERE A JUDGE ACTS IN THE ABSENCE OF ALL JURISDICTION OVER THE SUBJECT MATTER. JUDICIAL IMMUNITY ONLY EXTENDS TO ACTS WITHIN THE DISCRETION OF A JUDGE BUT NOT TO ACTS WHICH HE IS MANDATED TO CARRY OUT BY STATUTE.....	51
Conclusion.....	54
Appendix "A".....	55
Appendix "B".....	56

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<u>Agnew v. Moody</u> (9th Cir. 1964) 330 F.2d 868.....	11
<u>Bradley v. Fisher</u> (1872) U.S. 335 [20 L. Ed. 646]	18
<u>Campbell Elementary Teachers Assn., Inc. v. Abbott</u> (1978) 76 C.A.3d 796 [143 Cal. Rptr. 281]	40
<u>Chase v. Kalber</u> (1915) 28 Cal. App. 561 [153 P. 397] <u>Doe v. County of Lake, Indiana</u> (N.D. Ind. 1975) 399 F. Supp. 553.....	47-48
<u>Ex Parte Cassinello</u> (1881) 7 Pacific Coast L.J. 577.....	17
<u>Ex Parte Virginia</u> (1879) 100 U.S. 399 (25 L. Ed. 676).....	23
<u>Fain v. Hall</u> (M.D. Fla. 1979) 463 F. Supp. 661.....	31
<u>Gregory v. Thompson</u> (9th Cir. 1974) 500 F.2d 59.....	30
<u>Harris v. Harvey</u> (7th Cir. 1979) 605 F.2d 330, cert. den. 445 U.S. 938, 100 S. Ct. 1331 [63 L. Ed. 2d 772]	30
<u>In re McPhee's Estate, McPhee v. Corrigan</u> (1909) 10 Cal. App. 162 [101 P. 530].....	49

TABLE OF AUTHORITIES (continued)Page No.Cases (continued)

<u>Jones v. Czapkay</u> (1960) 186 Cal. App. 2d 192 [6 Cal. Rptr. 182]	53
<u>Jordan v. Hawaii Government</u> Emp. Ass'n Local 152, <u>AFSCME, AFL-CIO</u> (D. Hawaii 1979) 472 F. Supp 1123.....	30
<u>Lewis v. Linn</u> (1962) 209 Cal. App. 2d 394, 26 Cal. Rptr. 6.....	17, 18
<u>Luckie v. Goddard</u> (1939) 13 N.Y.S. 2d 808.....	31
<u>Lynch v. Johnson</u> (6th Cir. 1970) 420 F.2d 818.....	33
<u>Mill Valley v. Saxton</u> (1940) 41 Cal. App. 2d 290 [106 P.2d 455]	48
<u>Muskopf v. Corning Hospital District</u> (1961) 55 Cal. 2d 211 [11 Cal. Rptr. 89, 359 P.2d 457]	51
<u>Oppenheimer v. Ashburn</u> (1959) 173 Cal. App. 2d 624 [343 P.2d 931]	34
<u>Ortega v. Ragen</u> [C.A. Ill. 1954] 216 F.2d 561, certiorari denied 349 U.S. 940, 75 S. Ct.	20

TABLE OF AUTHORITIES
(continued)

	<u>Page No.</u>
<u>Cases (continued)</u>	
<u>O'Shea v. Littleton</u> (1974) 414 U.S. 488, 94 S. Ct. 669.....	21
<u>Paddleford v. Biscay</u> (1971) 22 Cal. App. 3d 139 [99 Cal. Rptr. 220].....	18-19, 35
<u>Padgett v. Stein</u> (M.D. Pa. 1975) 406 F. Supp. 287.....	26
<u>Penn v. Eubanks</u> (M.D. Ala. 1973) 360 F. Supp. 699.....	31
<u>Pierson v. Ray</u> (1967) 386 U.S. 547, 87 S. Ct. 1213 [18 L. Ed. 288].....	11
<u>Santiago v. City of Philadelphia</u> [E.D. Pa. 1977] 435 F. Supp. 136.....	31
<u>Shock v. Tester</u> [C.A. Ark. 1969] 405 F.2d 852, certiorari denied 394 U.S. 1020, 89 S. Ct. 1641 [23 L. Ed. 2d 45] rehrg. denied 395 U.S. 941, 89 S. Ct. 2004 [23 L. Ed. 2d 460].....	20
<u>Singer v. Bogen</u> (1957) 147 Cal. App. 2d 515, 305 P.2d 893.....	18
<u>Shore v. Howard</u> (N.D. Tex. 1976) 414 F. Supp. 379.....	26, 29, 31

TABLE OF AUTHORITIES (continued)Page No.Cases (continued)

<u>Stump v. Sparkman</u> (1978) 35 U.S. 349, 98 S. Ct. 1099 [55 L. Ed. 2d 331] rehearing denied (U.S.) 98 S. Ct. 2862 [56 L. Ed. 2d 795]	25
<u>Sweeney v. Young</u> (1925) 82 N.H. 159 [131 A. 155]	27
<u>Taglavia v. County of Los Angeles</u> (1980) 112 Cal. App. 3d 759 [169 Cal. Rptr. 467]	32
<u>Taliaferro v. County of Contra Costa</u> (1980) 182 Cal. App. 2d 587 [6 Cal. Rptr. 231]	34
<u>Trecho v. U.S.</u> (D. Nev. 1978) 464 F. Supp. 113.....	30
<u>Williams v. Stockton</u> (1925) 195 Cal. 743 [235 P. 986]	47

Statutes and Rules

<u>California Code of Civil Procedure</u> Section 1388.....	49
<u>California Constitution</u> Article 1, Section 1..... Article 1, Section 11..... Article 1, Section 21.....	14,15,16 15,16 15,16
<u>California Election Code</u> Section 28.....	44

TABLE OF AUTHORITIES (continued)

	<u>Page No.</u>
<u>Statutes and Rules</u> (continued)	
California Government Code	
Section 810.12.....	52
Section 815.2.....	43,49,53
Section 815.6.....	42,52
California Probate Code	
Section 541.....	4,13
United States Code	
18 U.S.C.	
Section 243.....	23
28 U.S.C.	
Section 1257(3).....	2,12
42 U.S.C.	
Section 1983.....	3,19
United States Constitution	
Fourteenth Amendment,	
Section 1.....	2,14,16,20
<u>Texts</u>	
Hart, <u>An Introduction to</u> <u>Administrative Law</u> , p. 140.....	25
<u>General Sources</u>	
American Jurisprudence 2d,	
1 Am. Jur. 2d,	
Administrative Law §83.....	46
46 Am. Jur. 2d,	
Judges §83.....	36

TABLE OF AUTHORITIES (continued)Page No.General Sources (continued)

Corpus Juris Secundum

48A C.J.S., Judges §89.....	30
48A C.J.S., Judges §90.....	31
48A C.J.S., Judges §91.....	45
82 C.J.S., Statutes §374.....	39,40
82 C.J.S., Statutes §377.....	41

Other Sources

Black's Law Dictionary, 5th Ed. (1979) p. 760.....	27
25 (2) How. L.J. (1982) 809.....	36

IN THE SUPREME COURT
OF THE UNITED STATES

DORA JANE HORTON,
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Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
THE STATE OF CALIFORNIA, THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA IN
AND FOR THE COUNTY OF SAN FRANCISCO,
BYRON ARNOLD,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Petitioner respectfully files
this Petition for Writ of Certiorari.

Opinions and
Orders Below

The Order of Supreme Court of
California denying petitioner a hearing
is printed in Appendix "A". The Opinion
of the Court of Appeal of the State of
California, First Appellate District

(Division Two) is printed in Appendix "B" hereto.

Jurisdiction

The Order printed in Appendix "A" hereto, which is sought to be reviewed, is dated February 1, 1984 and was filed February 1, 1984.

The jurisdiction of this court is invoked under Section 1257(3) of Title 28 of the United States Codes.

Statutory Provisions Involved
And Questions Presented

1. Amendment XIV Section 1 of the U.S. Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Petitioner respectfully submits that it is a denial of equal protection

to grant judicial immunity when a judge contravenes the laws created by the legislature.

2. Section 1983 of Title 42 of the United States Codes provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Petitioner submits that the probate judge denied petitioner equal protection of the law by applying the law unequally between persons similarly situated.

3. Judicial Immunity does not attach to all categories of conduct in which a judge may engage, but only to those acts

which are of a judicial or quasi-judicial nature.

4. California Probate Code Section 541 provides in pertinent part:

"(a) Except as otherwise provided in this section, every person to whom letters testamentary or of administrator are directed to issue (unless the testator has waived such requirement) shall, before receiving them, execute a bond to the State of California, to be approved by a judge of the superior court, conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law. If the bond is to be given by personal sureties, the amount shall be not less than twice the value of the personal property and twice the value of the probable annual income from the real property belonging to the estate, which values shall be ascertained by the court or judge by examining on oath the party applying, and any other persons. If the bond is to be given by an admitted surety insurer the court in its discretion may fix the amount of the bond at not less than the value of the personal property and the probable value of the annual rents, issues and profits of all of the property belonging to the estate."

California Probate Code Section 541 establishes a duty to set a bond and leaves no discretion in the court with respect to the minimum amount of the

bond. The Court's duty in such circumstances is purely ministerial or non-judicial.

5. Judicial immunity does not extend to situations where a judge acts in the absence of jurisdiction over the subject matter. Judicial Immunity is restricted to the single objective of protecting judicial freedom in the process of deciding civil and criminal cases. Where the initiative and independence of the judiciary is not effectively impaired, the doctrine of judicial immunity is not impaired.

Statement of Case

Petitioner Dora Jane Horton in her capacity as the administratrix of the estate of J. W. Ehrlich, deceased, appealed from an order which sustained, without leave to amend, the demurrer of defendants City and County of San Francisco, and the Superior Court for the

City and County of San Francisco, and which granted defendant Byron Arnold's motion to quash the service of summons and complaint upon him. Petitioner also appealed from a judgment on the pleadings in favor of defendant State of California. The Court of Appeals by its Order filed November 22, 1983 affirmed the order and judgment of the lower court.

Petitioner thereafter appealed the decision to the Supreme Court of the State of California. By its Order of February 1, 1984, the California Supreme Court denied petitioner a hearing in the matter.

The facts of the case are as follows:

J. W. Ehrlich died on December 24, 1971, and on December 29, 1971, his executor, Edward Dullea, filed a petition for probate of will and the issuance of

letters testamentary. Although this petition alleged that the estimated value of personal property in the decedent's estate was \$300,000.00, the Superior Court by order of January 11, 1972, appointed Dullea executor, subject to the filing of a bond in the amount of only \$100,000.00. California Probate Code §541 expressly provides for a bond not less than the value of personal property belonging to the estate, thereby leaving no discretion in the judge as to the minimum amount of the bond.

On July 5, 1978, the Superior Court issued a citation requiring that Dullea appear and show cause why he should not be removed as executor. Following a hearing, judgment was rendered against Dullea and Northwestern National Insurance Company (which had issued the \$100,000.00 bond) in the principal amount of \$272,988.04, plus

interest in the amount of \$76,436.64.

The Ehrlich estate ultimately recovered \$100,000.00 from the bonding company and \$82,024 from Dullea in the form of restitution.

On June 18, 1980, petitioner, as administratrix of the Ehrlich estate, commenced this action against the State of California, the City and County of San Francisco, and the Superior Court. The complaint alleged that the conduct of defendant Superior Court, by requiring a bond in an amount far less than the estimated value of the personal property in Ehrlich's estate, had rendered the court, the State, and the City and County liable for all losses which had not been repaid by the bonding company and Dullea. Petitioner sought damages in the principal amount of \$167,400.68, plus interest.

The City and County of San Francisco demurred to the complaint, alleging that the complaint was barred by the doctrine of judicial immunity.

On April 29, 1981 petitioner moved to substitute Byron Arnold, the superior court judge who had set Dullea's bond at \$100,000.00, in place of Doe 1 of the complaint. Judge Arnold moved to quash the service of the summons and complaint upon him, alleging that petitioner had failed to name him as a defendant until after the statute of limitations had run. Petitioner filed points and authorities in opposition to the demurrer and in opposition to the motion to quash.

On December 11, 1981, the trial court sustained the demurrer of the City and County of San Francisco and of the Superior Court without leave to amend,

and also granted Judge Arnold's motion to quash.

Thereafter, the court granted the State's motion for judgment on the pleadings.

Petitioner appealed these rulings and the Court of Appeals affirmed the holdings of the trial court. Thereafter, petitioner appealed to the Supreme Court of California but was denied a hearing.

Petitioner first raised the Federal constitutional issue of denial of equal protection in its "Points and Authorities in Opposition to the State of California's demurrer to complaint." This question was again raised in the Court of Appeals and the Supreme Court of California. The Court of Appeals at page 6 of its Order (Appendix A) rules on the equal protection issue as follows:

"A classification will generally be upheld against an equal protection challenge as

long as it has a reasonable relationship to any proper purpose. (County of Los Angeles v. Superior Court (1965) 62 Cal.2d 839, 846) There is ample reason for placing judges in a separate class and according them broad immunity for their official acts. Thus, as pointed out in Paddleford v. Biscay, supra, 22 Cal.App.3d 139, 143: 'Few doctrines were more solidly established at common law the immunity of judges from liability for damages for acts committed within their jurisdiction. This immunity applies even when the judge is accused of acting maliciously or corruptly. Such immunity is not to protect wayward judges, but rather to protect the public, in whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences. See Pierson v. Ray, (1967) 386 U.S. 547, 554, 87 S.Ct. 1213, [18 L.Ed 288]. See also Agnew v. Moody, 330 F.2d 868, 869 (9th Cir. 1964).'"

Petitioner respectfully submits
that the Court failed to take into
consideration the fact that the doctrine

of judicial immunity does not apply when the judge is performing a ministerial or administrative function, as is the case here. The judge had no discretion but to post the bond in the minimum amount specified by law. Petitioner was denied equal protection of the law in that the application of the statute by the judge was unequal and abridged the rights of beneficiaries.

Reasons for Allowance of the Writ
And Authorities in Support Thereof

1. THE SUPREME COURT MAY REVIEW A FINAL JUDGMENT OR DECREE RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD BY WRIT OF CERTIORARI WHERE ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY IS SPECIALLY SET UP OR CLAIMED UNDER THE CONSTITUTION, TREATIES OR STATUTES OF, OR COMMISSION HELD OR AUTHORITY EXERCISED UNDER, THE UNITED STATES.

Section 1257(3) of Title 28 of the United States Codes provides for review by the Supreme Court by writ of certiorari, where (i) the validity of a

treaty or statute of the United States is drawn in question, or (ii) where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or (iii) where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties of, or commission held or authority exercised under, the United States. Petitioner submits that the application of Probate Code §541 by Judge Arnold deprived petitioner of equal protection of the laws guaranteed by the United States Constitution. The decisions of the Court of Appeals, and Supreme Court of California denying petitioner a hearing, conflict with decisions of this Court which state that the doctrine of judicial immunity does not apply to ministerial and administrative acts of judges.

2. IT IS A DENIAL OF EQUAL
PROTECTION TO GRANT JUDICIAL
IMMUNITY WHICH WOULD CONTRAVENE
THE LAWS CREATED BY THE
LEGISLATURE.

Amendment XIV Section 1 of the
U.S Constitution states:

"All persons born or
naturalized in the United
States, and subject to the
jurisdiction thereof, are
citizens of the United
States and of the state
wherein they reside. No
State shall make or enforce
any law which shall abridge
the privileges or
immunities of citizens of
the United States; or shall
any state deprive any person
of life, liberty, or
property, without due
process of law; nor deny to
any person within its
jurisdiction the equal
protection of the law."
(Emphasis added)

Similarly the California Constitu-
tion, Art. 1, Section 1 states:

"All men are by nature free
and independent, and have
certain inalienable rights,
among which are those of en-

joying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

California Constitution, Article 1, Section 11 states:

"All laws of a general nature shall have uniform operation."

California Constitution, Article 1, Section 21 states:

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which upon the same terms, shall not be granted to all citizens."

(Emphasis added)

These three articles of the California Constitution comprise the equal protection of laws theories in California. Petitioner respectfully submits that by not following a mandatory provision of the statute the court deprived petitioner of a privilege

conferred by law and which privilege was accorded other citizens.

In the instant case, not only does the language of Probate Code §541, supra, create a ministerial duty which cannot be overlooked, but public policy and necessity that courts enforce the laws, even against themselves and other governmental entities, for the benefit of the public, overshadows respondents' assertion of judicial immunity. To do otherwise violates the constitutional guarantees of due process and equal protection of the law. (U.S. Const. Amendment XIV, Sec. 1; Cal. Const. Art. I, Sec. 1, Cal. Const., Art. I, Sec. 11, Cal. Const. Art. I, Sec. 21)

Certain inalienable rights are afforded all persons under the Constitution, including "acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." The

Court in its failure to apply the law did not "protect petitioner's property." In addition, petitioner was unable to obtain the "safety and happiness" expected by enforcement of said statute enacted by the State legislature in furtherance of the public power of the state of extending to the protection of the lives, health, comfort and quiet of all persons and property within the state. Ex Parte Cassinello (1881) 7 Pacific Coast L.J. 577.

Furthermore, to make officers of the court "immune" from liability for noncompliance with a statute expressly creating a judicial duty, denies petitioner equal protection of the laws.

The cases are clear that where there is absence of jurisdiction of the subject matter there is no immunity.

Lewis v. Linn (1962) 209 C.A.2d 394 [26 Cal. Rptr. 6]. As has been stated there

was absence of jurisdiction because the Court had no authority to require a bond less than the amount mandated by Prob. Code §541.

We must, however, further heed the Lewis court:

In determining 'jurisdiction' for this purpose, great care must be taken to avoid becoming ensnared in the conflicting technical definitions of the term.

Lewis, supra, citing Singer v. Bogen (1957) 147 C.A.2d 515, 524 [305 P.2d 893].

Petitioner is, therefore, correct in contending that the court failed to comply with its ministerial task imposed by statute and the court may not claim immunity. Bradley v. Fisher (1872) U.S. 335, 351 [20 L.Ed 646], cited in Paddleford v. Biscay (1971) 22 C.A.3d 139 (99 Cal. Rptr. 220).

3. THE JUDGE ACTING UNDER COLOR OF LAW
DEPRIVED PETITIONER OF THE RIGHT TO
EQUAL PROTECTION OF THE LAWS
GUARANTEED BY BOTH THE U.S. AND
CALIFORNIA CONSTITUTIONS.

Section 1983 of Title 42 of the United States Code provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ..." It is proper for a person

adversely affected to bring an action under this section on grounds that he has been denied his rights under the equal protection clause of the U.S.C.A.

Constitution Amendment 14. (Shock v. Tester, [C.A. Ark. 1969] 405 F.2d 852, certiorari denied 394 U.S. 1020, 89 S. Ct. 1641, [23 L.Ed 2d 45], rehearing denied 395 U.S. 941, 89 S. Ct. 2004, [23 L.Ed 2d 460].

In Ortega v. Ragen, [C.A. Ill. 1954] 216 F.2d 561, certiorari denied 349 U.S. 940, 75 S. Ct. 786, [99 L.Ed 1268] the court held that where appeals are provided for there must be no arbitrary discrimination, and if a plaintiff in an action under this section can show that he was not allowed to appeal his conviction while others in his position were, he would show deprivation of his right to equal protection of the laws. Similarly here, there was arbitrary discrimination when a bond in a lesser sum than mandated by statute was required of executor Dullea while others in the same position were required to post a bond in the value

of the personal property of deceased's estate. There was a denial of equal protection which resulted in a large monetary loss to the beneficiaries of deceased's estate.

Although it has been repeatedly held by various courts that the principle of judicial immunity extends to actions brought under the Civil Rights Act (42 USCA Section 1983) it has equally often been stated that the doctrine of judicial immunitiy is restricted to its single objective of protecting judicial freedom in the process of deciding civil and criminal cases. In O'Shea v. Littleton, (1974) 414 U.S. 488, 503, 94 S. Ct. 669, this court held that despite its fundamental and efficacious purpose, the doctrine of judicial immunity is not absolute and unlimited; it does not immunize every state court judge in every lawsuit. On the contrary, application of

the doctrine is restricted to its single objective: to protect judicial freedom in the delicate process of deciding civil and criminal matters on their merits. Where the initiative and independence of the judiciary will not be effectively impaired, courts have refused to apply the doctrine of judicial immunity. In this case, the statute (California Probate Code Section 541) mandated the minimum amount of the bond in an amount not less than the value of personal property in the estate of the deceased. The judge in this case had no initiative or independence to require a bond in a lesser sum. The doctrine of judicial immunity was therefore not necessary to protect judicial freedom in the "delicate process of deciding civil and criminal matters on their merits." It is respectfully submitted that the doctrine of judicial immunity is inapplicable in

the instant case.

The Supreme Court recognized long ago that a state court judge can be made to answer criminally for violating the criminal provisions of the Civil Rights Act. *Ex Parte Virginia* (1879) 100 U.S. 399, [25 L.Ed 676.] In addition federal courts have held that application of the doctrine is restricted to the following:

Immunity applies only when judges are faced with suits involving their judicial as opposed to ministerial or administrative duties.

Whether an act is judicial as opposed to ministerial or administrative is to be determined by the character of the act and not by the character of the actor. The first case to recognize this distinction was *Ex Parte Virginia* (1879) 100 U.S. 339, [25 L.Ed 676] where a judge of a Virginia Circuit Court was indicted under the predecessor of 18 U.S.C. §243, for excluding from the grand and petit

jury lists the names of black citizens who were otherwise qualified. The Court rejected the petitioner's contention that he was immune from indictment because he was acting in the performance of a judicial act, stating that:

"Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge ... It is merely a ministerial act." (100 U.S. at 348)

Petitioner respectfully submits that the mandatory duty imposed upon the judge by California Probate Code Section 541 did not leave him with discretion to act otherwise. His act, therefore, in fixing the minimum amount of the bond should be considered purely ministerial since it could have been performed by a commissioner or even a private person.

Observing that it is only for acts performed in his "judicial" capacity that a judge is immune from civil liability, the court in Stump v. Sparkman (1978) 35 U.S. 349, 98 S. Ct. 1099, [55 L.Ed 2d 331], reh. den. (U.S.) 98 S. Ct. 2862, [56 L.Ed 2d 795], explained that the factors determining whether an act by a judge is a "judicial" one relate first, to the nature of the act itself, that is, whether it is a function normally performed by a judge, and second, to the expectations of the parties, that is, whether they dealt with the judge in his judicial capacity.

In the present case, the nature of the act is clearly mandated by statute, i.e., there is no discretion in the judge to require posting of a bond in an amount less than the value of personal property in the estate. Therefore, the parties could expect that as a matter of

course this statute would be followed,
without even an appearance by them in
court. As stressed earlier, even a
"private person" could have performed the
act of requiring a bond equal to the
value of personal property in the estate
when this value was clearly set out in
the petition for letters testamentary.

4. JUDICIAL IMMUNITY DOES NOT ATTACH TO
ALL CATEGORIES OF CONDUCT IN WHICH
THE JUDGE MAY ENGAGE, BUT ONLY TO
THOSE ACTS WHICH ARE OF A JUDICIAL OR
QUASI-JUDICIAL NATURE

In several cases the United
States Supreme Court and the federal
courts have held that the doctrine of
judicial immunity is inapplicable in a
case involving a non-judicial act. (Ex
Parte Virginia (1879) 100 U.S. 339 [25
L.Ed. 676]; Shore v. Howard (N.D. Tex.
1976) 414 F. Supp. 379; Padgett v. Stein
(M.D. Pa. 1975) 406 F. Supp. 287; Doe v.
County of Lake, Indiana (N.D. Ind. 1975)
399 F. Supp. 553) The United States

Supreme Court recognized the distinction between ministerial acts and those of a judicial nature, and set down standards for determining the character of any act.

A judicial act is "an act which involves exercise of discretion or judgment" (See Black's Law Dictionary [rev. 5th ed. 1979] p. 760). But, the act of an officer does not become judicial simply because it requires some discretion and judgment; it becomes judicial only when there is an opportunity to be heard, and there is production and weighing of evidence and a decision thereon (Sweeny v. Young (1925) 82 N.H. 159 [131 A. 155])

In the instant case, as petitioner will argue, California Probate Code Section 541 mandated the imposition of a bond as a condition to receiving letters testamentary. The section

further mandated that the amount of the bond shall be fixed at "not less than the value of the personal property and the probable value of the annual rents, issues and profits of all the property belonging to the estate." (Emphasis added) The petition for letters filed December 29, 1971, clearly stated that the estimated value of the property of the estate of decedent, so far as known, was \$300,000.00. The court had a duty to fix the amount of the bond at not less than \$300,000.00. To that extent, its function was purely ministerial. The statute leaves no discretion for the judge to fix the bond at a sum less than the value of the personal property. The Court, however, had the authority to fix the bond at more than the value of personal property. It is clear that the judge did not follow the law as mandated by California Probate Code 541, and this

breach led to beneficiaries' loss.

In Shore v. Howard, op. cit.

supra, at p. 385, it is stated:

Common law immunities extend only so far as the interests of the common good demand protection for the holder of the office from liability for carrying out his official functions. The application of the doctrine of judicial immunity is restricted to its simple objective of protecting judicial freedom in the process of deciding civil and criminal cases. Where the initiative and independence of the judiciary is not effectively impaired, the doctrine of judicial immunity does not hold." (Emphasis added)

In the present case, the doctrine of judicial immunity is inapplicable. The judge does not need protection of that doctrine to safeguard him in a decision-making process. In fact California Probate Code Section 541 was enacted for protection against exactly the type of harm suffered by the

beneficiaries in this case. The judge, herein, failed to discharge a mandatory duty imposed on him by statute - a duty in respect to which he had no discretion whatsoever. He should be held liable for the losses suffered by the estate of the decedent.

48 Corpus Juris Secundum, Judges, Section 89, p. 697, states that judicial immunity does not automatically attach to all categories of conduct in which a judge may properly engage, but only to those acts which are of a judicial or quasi-judicial nature. (Harris v. Harvey (7th Cir. 1979) 605 F.2d 330, cert. den., 445 U.S. 938, 100 S. Ct. 1331 [63 L.Ed. 2d 772]; Gregory v. Thompson (9th Cir. 1974) 500 F.2d 59; Jordan v. Hawaii Government Emp. Ass'n, Local 152, AFSCME, AFL-CIO (D. Hawaii 1979) 472 F. Supp. 1123; Trecho v. U.S. (D. Nev. 1978) 464 F. Supp. 113.

48A Corpus Juris Secundum,
Judges, Section 90, p. 699, et seq.,
states:

The broad doctrine of judicial immunity does not apply to acts which are not judicial, but purely ministerial or administrative in character. Hence, when a judge acts ministerially, or is required to do a ministerial act, he is responsible for error or misconduct in like manner and to the same extent as all other ministerial officers. He is also liable whether he acts personally or through a clerk whom he has authorized to perform the act. Also, failure of a judge to perform the ministerial duties imposed on his office may result in liability for any damage resulting from such failure. (Emphasis added) See Santiago v. City of Philadelphia (E.D. Pa. 1977) 435 F. Supp. 136; Shore v. Howard (N.D. Tex. 1976) 414 F. Supp. 379; Doe v. Lake County, Indiana (N.D. Ind. 1975) 339 F. Supp. 533; Penn v. Eubanks (M.D. Ala. 1973) 360 F. Supp. 699; Fain v. Hall (M.D. Fla. 1979) 463 F. Supp. 661; and Luckie v. Goddard (1939) 13 N.Y. S.2d 808.

The Court of Appeal, in its Order (Appendix "B" hereto) affirming judgment in favor of Respondents, cites Taglavia v. County of Los Angeles (1980) 112 C.A.3d 759, at p. 761 [169 Cal. Rptr. 467], as follows:

"The decisions of this state uniformly and consistently grant immunity from civil suit to judges in the exercise of their judicial function."

Taglavia, supra, involved a plaintiff who brought suit against the commissioner of the municipal court and Los Angeles County alleging false imprisonment. The Superior Court, along with Los Angeles County, dismissed the suit, and plaintiff appealed. The Court of Appeal held that a commissioner of a municipal court, who was acting as a judge pro tem, at the time he issued the order placing plaintiff in custody, was entitled to judicial immunity from suit alleging false impris-

onment. The Court stated that judges in the exercise of their judicial functions have immunity from civil suit even if their acts are in excess of the jurisdiction of the judge and are alleged to have been done maliciously and corruptly.

However, the court also acknowledged that service by a judge on a board with only legislative and administrative powers does not constitute a judicial act, and there is no judicial immunity. [Lynch v. Johnson (6th Cir. 1970) 420 F.2d 818]

(Emphasis added) Such service on a board by a judge does not constitute a judicial act, but a ministerial one comparable to the act of the Superior Court judge here undertaking the mandatory ministerial duty imposed by the legislature by California Probate Code Section 541.

Petitioner contends that where a mandatory duty is imposed upon a judge by statute - his function is purely minis-

terial or non-judicial. No discretion is vested in the judge with respect to that act. There is no immunity where the judge is required by statute to perform a purely non-discretionary, ministerial act.

All the cases cited by the Court of Appeals in its Order (Appendix "B" hereto) refer to judicial immunity in connection with discretionary acts performed by the judge in the exercise of his judicial function. None of the cases refer to an act by a judge which violates a mandatory duty imposed by the legislature.

(a) Oppenheimer v. Ashburn (1959) 173 C.A.2d 624 [343 P.2d 931] involved a refusal to grant order for writ of habeas corpus;

(b) Taliaferro v. County of Contra Costa (1960) 182 C.A.2d 587 [6 Cal. Rptr. 231] involved a judge who

issued a warrant upon a criminal complaint charging plaintiff with the commission of a misdemeanor;

(c) Paddleford v. Biscay (1971)

22 C.A.3d 139 [99 Cal. Rptr. 220] was an action against a judge of the municipal court on the ground that he had signed a printed form of warrant permitting service day or night for warrants involving traffic violations.

It is respectfully submitted that in all these cases, the judges exercised discretion permitted them by statute. In none of these cases did a judge fail to follow a mandatory duty imposed on him by law, where a breach of that duty resulted in exactly the kind of harm which the statute sought to prevent.

Petitioner submits that the statute (California Prob. Code §541) requires a judge to fix the amount of bond at "not less than" the value of

personal property in the decedent's estate. This act, as the cases state, could have been accomplished by a commissioner, or even a private person. There is absolutely no discretion in the judge regarding the minimum amount of the bond. The discretionary requirement envisions that the act, though discretionary, be one performed by the judge within his judicial capacity, i.e., because he is a judge. This necessitates the presumption that the actor be learned in the law and, therefore, able to exercise the required discretion and render an appropriate judgment (Please see 46 Am. Jur. 2d, Judges, §83; and 25(2) How. L.J. (1982) 809, 816. There is no discretion regarding the minimum amount of the bond and, therefore, no necessity that the "actor be learned in the law."

5. CALIFORNIA PROBATE CODE SECTION 541 ESTABLISHES A DUTY TO SET A BOND AND LEAVES NO DISCRETION IN THE COURT WITH RESPECT TO THE MINIMUM AMOUNT OF THE BOND

California Probate Code §541

states in pertinent part:

Except as otherwise provided in this section, every person to whom letters testamentary or of administration are directed to issue (unless the testator has waived such requirement) shall, before receiving them, execute a bond to the State of California, with two or more persons or an authorized surety company as surety (Emphasis added)

This portion of California Probate Code §541, by the use of the word "shall" clearly mandates the imposition of a bond as a condition to receiving letters testamentary. The statute further states the requirement for fixing bonds, and in the case of an authorized surety mandates the following:

If the bond is to be given by an authorized

surety company, the court in its discretion may fix the amount of bond at not less than the value of the personal property and the probable value of the annual rents, issues and profits of all the property belonging to the estate. (Emphasis added)

The duty imposed on the court is clear. There is a mandatory requirement (hence a ministerial act) to fix the amount of the bond at not less than the value of personal property of the estate. However, the court has discretion to set the bond at higher than the value of personal property of the estate, etc. The requirement of the minimum bond amount is mandatory.

Under the facts herein, the Court did not follow Probate Code §541 in that the petition for letters filed December 29, 1971, state as follows:

The character and estimated value of the property of the estate of decedent, so far as known to petitioners,

are: Personal Property of the Estimated Value of \$300,000.00. Bond of the Executor is not waived in the Will.

After filing of the petition this Court issued its order requiring bond in the sum of \$100,000.00 only.

The requirement that a bond be fixed at not less than "the value of personal property . . ." belonging to the estate was the law at the time letters were granted, as it is today.

The Court had a clear duty to require a bond at a minimum amount of \$300,000.00 (the value of the personal property) and breached its ministerial duty in ordering a bond in a lesser amount.

82 Corpus Juris Secundum, Statutes Section 374, page 868 states that a failure to follow a mandatory statutory provision renders the proceeding to which it relates illegal

and void, while a failure to follow a directory provision does not necessarily invalidate the proceeding. This rule has been adopted in California in Campbell Elementary Teachers Assn., Inc., v. Abbott (1978) 76 C.A.3d 796 [143 Cal. Rptr. 281].

82 Corpus Juris Secundum,
Statutes Section 374 at p. 869 states:

"As suggested by the definition of the term, failure to comply with a mandatory provision of a statute renders a proceeding void, and when a mandatory statute is invoked the courts have no discretion in its administration except to enforce it as written."

In this case since the judge failed to comply with a mandatory provision of a statute (namely California Probate) the proceeding before him is rendered void. It follows logically that the judge would therefore become liable

for damages caused to petitioner as a result of the void proceedings.

California Probate Code §541 provides that the court should fix the amount of the bond at not less than the value of the personal property. 82

Corpus Juris Secundum, Statutes, Section 377 at p. 875 states:

"It is a general rule that a statute which is negative or prohibitory, even though it provides no penalty for noncompliance, or which contains peremptory and exclusive terms, shows a legislative intent to make the provision mandatory ..."'

The legislative intent in this case is to protect the beneficiaries of the estate from unscrupulous administrators and executors. The court failed to comply with the mandatory provisions of the statute and caused loss to the beneficiaries. The judge in this case should be held liable.

Although the word "may" is used in the statute in contradistinction to "shall" or "must", a mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or the public good (82 Corpus Juris Secundum Statutes at p. 880). In the present case the legislative intent clearly appears to require a mandatory construction to California Probate Code §541. The judge failed to obey this mandate and the proceedings before him were, therefore, void. The losses subsequently suffered by the estate were a foreseeable result of the breach and caused the type of injury which was to be protected against by California Government Code §815.6.

California Government Code §815.6

provides:

"Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Emphasis added)

That the public entity can be responsible for the harm caused petitioner is established in California Government Code §815.2 which states as follows:

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment, if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

The question that remains for consideration is whether the judge (a public employee by virtue of California Government Code §810.12, and California Election Code §28) is liable for the injury caused by his failure to follow Cal. Probate Code §541. If he had discretion in the matter, he would have absolute judicial immunity. On the other hand, if the Court finds that the duty imposed was mandatory and, therefore, ministerial, he would be liable for "an injury of that kind proximately caused" by his failure to discharge his duty. In such a case there would be no judicial immunity.

48A Corpus Juris Secundum,

Judges, Section 91, p. 700 states:

"A judge may be liable in damages for taking an insufficient bond where the act is considered as ministerial and he has failed to exercise ordinary care in the performance of his ministerial duty . . ."

Apart from statute, the liability of a judge for failing to require a sufficient, or in taking an insufficient, bond in cases under his jurisdiction depends on whether such act is considered ministerial or judicial (48A C.J.S., Judges, §91, p.100). Whether the act is judicial or ministerial depends upon the wording of the statute.

From their nature, the functions, powers and duties of officers are, in general, classified as ministerial or discretionary, or they may be classified according to the degree of subjective choice involved in their exercise; for

example: discretionary; judgement-passing; fact finding; or ministerial; i.e., the four classes representing the degrees of progression from a theoretically absolute subjective choice, in a matter of discretion, to a theoretical absence of choice, in a ministerial matter. (Hart, An Introduction to Administrative Law, p. 140)

The character of a function or duty as policy making, discretionary, or ministerial, must be determined by the nature of the act to be performed, and not by the office of the performer. The very essence of a discretionary power is that the person or persons executing it may choose which of several courses will be followed. (1 Am. Jur. 2d, Administrative Law, §83.) (Emphasis added)

A judge in the instant case had no choice regarding the minimum amount of bond required to be posted. It simply

had to be "not less than" the value of the personal property in the estate. He did, however, have discretion in fixing an amount greater than the value of the personal property.

A ministerial act has been defined as one that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed, when a given state of facts exist.

(Williams v. Stockton (1925) 195 Cal. 743 [235 P. 986]) Stated otherwise, a ministerial act is one with respect to the performance of which a public officer can exercise no "discretion" -- an act or duty prescribed by some existing law [so] that it is incumbent on him to perform precisely as laid down by the law. (See also, Chase v. Kalber (1915) 28 C.A. 561

[153 P. 397]; and Mill Valley v. Saxton
(1940) 41 C.A.2d 290 [106 P.2d 455])
(Emphasis added)

There can be no doubt from the wording of California Probate Code §541 that the legislature intended that a judge absolutely cannot require a bond less than the value of the personal property in the estate. This statute was enacted for the protection of an estate, and its beneficiaries, against precisely the kind of harm suffered in this particular case. It is respectfully submitted that the Supreme Court determine this important question of law: When a statute imposes a mandatory duty on a judge, he may not disregard it -- otherwise, what use is such a statute? The City and County of San Francisco, and the State of California would, therefore, be liable for the losses caused by the act of the judge in failing to perform a ministerial duty imposed upon him by

statute based upon California Government Code §815.2 and the doctrine of respondent superior.

The legislative history of California Probate Code §541 makes it clear that the purpose of the legislature in enacting this section was to mandate a minimum amount of bond before issuing letters testamentary. Formerly California Code of Civil Procedure §1388 mandated that the bond "must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of the real property belonging to the estate. . ." In re McPhee's Estate, McPhee v. Corrigan (1909) 10 C.A. 162 [101 P. 530], a case decided under C.C.P. §1388, the court statd that although C.C.P. §1388 expressly requires that an administrator's bond shall be at least twice the value of the personal property

. . . the court has a discretion which the statute does not control further than to prescribe the minimum limit. In other words, although there is discretion with respect to requiring further or additional security, there is no discretion where the minimum limit is concerned.

It is respectfully submitted by petitioner that this Court determine that following the mandate of California Probate Code §541, the judge had a ministerial duty to fix the bond in an amount not less than the value of this estate. By virtue of the fact that the judge breached this ministerial duty, liability should attach.

* * *

6. JUDICIAL IMMUNITY DOES NOT EXTEND TO SITUATIONS WHERE A JUDGE ACTS IN THE ABSENCE OF ALL JURISDICTION OVER THE SUBJECT MATTER. JUDICIAL IMMUNITY ONLY EXTENDS TO ACTS WITHIN THE DISCRETION OF A JUDGE BUT NOT TO ACTS WHICH HE IS MANDATED TO CARRY OUT BY STATUTE.

It is clear after reading the statutes and the cases that neither the legislature nor the courts by precedents intended to place a judge above the law.

Justice Traynor wrote that "there is not governmental immunity from tort liability, and that in "formulating 'rules' or 'exceptions,' we are apt to forget that when there is negligence, the rule is liability, immunity the exception." Muskopf v. Corning Hospital District (1961) 55 C.2d 211 [11 Cal. Rptr. 89, 359 P.2d 457]. Petitioner urges this Court to rule that the public entities, the State of California and the City and County of San Francisco, are jointly and severally liable for the

damage proximately caused petitioner by respondent Superior Court's breach of duty in failing to comply with ministerial duties imposed by law. California Government Code §810.12 includes in its definition of public employee a "judicial officer as defined in Election Code §28." The California Election Code defined judicial officer to include a "judge of the superior court."

The statutes clearly establish as fact that where there is a duty mandated by statute, a breach of that duty can lead to liability, California Government Code §815.6 states the rule:

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it

exercised reasonable diligence to discharge the duty." (Emphasis added)

This rule is extended to an individual not only by statutes which define which parties can be liable but also by the cases. The case of Jones v. Czapkay (1960) 186 C.A.2d 192 [6 Cal. Rptr. 182], established that an individual may be liable by stating as follows:

The test for determining whether liability attaches individually to acts of public officers depends upon whether they were either acting without the scope of their authority or were acting within the scope of their authority in a ministerial capacity only. In either event, liability would attach.

That the public entities can be responsible for the harm caused petitioner is established in Government Code §815.2 which is stated earlier.

Clearly, therefore, a breach of duty established by statute can render

-54-

judicial officers liable and incapable of invoking the protection of governmental or judicial immunity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

DATED: April 25, 1984.

Respectfully submitted,

WILLIAMS, MARTINET & RABIN

By Paul E. Rabin
Attorneys for Petitioner

55.

CLERK'S OFFICE, SUPREME COURT

4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 1 1984

I have this day filed Order _____

HEARING DENIED _____

In re: 1 Civ. No. A016595

DORA JANE HORTON

vs.

CITY AND COUNTY OF SAN FRANCISCO

Respectfully,

APPENDIX "A"

56.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

A016595

(San Francisco Co.
Super. Ct. No. 768099)

DORA JANE HORTON, Administratrix
with Will Annexed of the Estate of
J. W. EHRLICH etc.,

Plaintiff and Appellant,
v.

CITY AND COUNTY OF SAN FRANCISCO,
et al.,

Defendants and Respondents.

APPENDIX "B"

In her capacity as the administratrix of the estate of J. W. Ehrlich, deceased, plaintiff Dora Jane Horton appeals from an order which sustained, without leave to amend, the demurrer of defendants City and County of San Francisco (City and County) and the Superior Court for the City and County of San Francisco (Superior Court) and which granted defendant Byron Arnold's motion to quash the service of summons and complaint upon him.¹ Plaintiff also appeals from a judgment on the pleadings in favor of defendant State of California (State).

¹ An appeal will not lie from an order sustaining a demurrer without leave to amend, but only from the resulting judgment of dismissal. (Beazell v. Schrader (1962) 205 Cal.App.2d 673, 674.) Although it appears that, in this instance,

J. W. Ehrlich died on December 24, 1971, and on December 29, 1971, his executor, Edward Dullea, filed a petition for probate of will and the issuance of letters testamentary. Although this petition alleged that the estimated value of the personal property in the decedent's estate was \$300,000, the Superior Court, by order of January 11, 1972, appointed Dullea executor subject to the filing of a bond in the amount of only \$100,000.

Several years later, on July 5, 1978, the Superior Court issued a citation requiring that Dullea appear and

(fn. 1 cont'd.)
no judgment of dismissal was ever entered, it has been held that the appeal can nevertheless be saved by deeming the order sustaining the demurrer to incorporate a judgment of dismissal and by

show cause why he should not be removed as executor. Following a hearing, judgment was rendered against Dullea and Northwestern National Insurance Company (which had issued the \$100,000 bond) in the principal amount of \$272,988.04, plus interest in the amount of \$76,436.64. The Ehrlich estate ultimately recovered \$100,000 from the bonding company and \$82,024 from Dullea in the form of restitution.

On June 18, 1980, plaintiff, as administratrix of Ehrlich's estate, commenced this action against the State, the City and County, and the Superior

(fn. 1 cont'd.)
judgment. (California State Employees' Assn. v. State of California (1973) 32 Cal.App.3d 103, 106, fn. 1.) We shall so construe the order sustaining the demur-
rer and plaintiff's notice of appeal.

Court. The theory of the complaint was that the conduct of defendant Superior Court, by requiring a bond in an amount far less than the estimated value of the personal property in Ehrlich's estate, had rendered that court, the State, and the City and County liable for all losses which had not been repaid by the bonding company and Dullea. Plaintiff sought damages in the principal amount of \$167,400.68, plus interest.

The City and County and the Superior Court demurred to the complaint, alleging, *inter alia*, that it was barred by the doctrine of judicial immunity.

(fn. 1 cont'd.)

An order quashing service of summons is appealable pursuant to Code of Civil Procedure Section 904.1, subdivision (c).

On April 29, 1981, plaintiff moved to substitute Byron Arnold, the superior court judge who had set Dullea's bond at \$100,000, in place of Doe I of the complaint. Judge Arnold moved to quash the service of the summons and complaint upon him, alleging that plaintiff had failed to name him as a defendant until after the statute of limitations had run.

Plaintiff filed points and authorities in opposition to the demurrer and in opposition to the motion to quash.

On December 11, 1981, the trial court sustained the demurrer of the City and County and of the Superior Court without leave to amend, and also granted Judge Arnold's motion to quash.

Thereafter, the court granted the State's motion for judgment on the pleadings.

In order for plaintiff to prevail against any of the defendants, she must

establish that a superior court judge is liable for damages resulting from his conduct in setting an executor's bond at an amount substantially below the value of the personal property in the decedent's estate. This single act on the part of the judge, or the superior court, constitutes the gravamen of plaintiff's case, and the alleged liability of the City and County and the State is purely vicarious in nature and based upon a respondent superior theory. If plaintiff has no case against the judge or court for failing to set a higher bond for the executor, she likewise has no case against the other defendants. We have concluded that plaintiff has no basis for imposing liability upon any of the defendants.

In Tagliavia v. County of Los Angeles (1980) 112 Cal.App.3d 759, 761, the most recent California case in a long

line of authority on the subject, the appellate court summarized the state of the law as follows: "The decisions of this state uniformly and consistently grant immunity from civil suit to judges in the exercise of their judicial functions. (Oppenheimer v. Ashburn (1959) 173 Cal.App.2d 624 [343 P.2d 931].) That is true even if the acts are in excess of the jurisdiction of the judge and are alleged to have been done maliciously and corruptly. (Turpen v. Booth (1880) 56 Cal.65.) As stated in Taliaferro v. County of Contra Costa (1960) 182 Cal.App.2d 587 [5 Cal.Rptr. 231], the rule is true whether the acts are of an inferior court or one of general jurisdiction, and public policy requires that such immunity is necessary to preserve the system established for the administration of the law."

Plaintiff seeks to avoid the impact

of these established legal principles by contending that they are inapplicable where a judge disobeys a mandatory duty imposed by statute. She claims that since section 541 of the Probate Code provides, in pertinent part, that the probate court may fix the amount of an executor's bond "at not less than the value of the personal property" in the decedent's estate, it follows that, in this instance, the Superior Court was required to set Dullea's bond at no less than \$300,000; therefore, the court acted in excess of its jurisdiction when it set that bond at only \$100,000.

We find no merit in plaintiff's argument. In Paddleford v. Biscay (1971) 22 Cal.App.3d 139, 143, a case upon which plaintiff relies, we held that it had long been the rule that the doctrine of judicial immunity applied unless the judge in question had acted in the

absence of all jurisdiction; that there was a fundamental distinction between a mere excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Further, we held that, since the defendant in that case was a municipal court judge with subject matter jurisdiction over the issuance of warrants involving such violations, he was entitled to the defense of judicial immunity even though he had failed to comply with the California statutes governing the issuance of warrants. (P. 144.) The reasoning of Paddleford is controlling. Here, the Superior Court, acting as a probate court, had subject matter jurisdiction over the issuance of letters testamentary to an executor and the setting of his bond.

Plaintiff also contends that it is a violation of equal protection of the laws to grant judicial immunity to a judge who

has violated the requirements imposed by a statute.

A classification will generally be upheld against an equal protection challenge as long as it has a reasonable relationship to any proper purpose.

(County of Los Angeles v. Superior Court (1965) 62 Cal.2d 839, 846.) There is ample reason for placing judges in a separate class and according them broad immunity for their official acts. Thus, as pointed out in Paddleford v. Biscay, supra, 22 Cal.App.3d 139, 143: "'Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their jurisdiction. This immunity applies even when the judge is accused of acting maliciously or corruptly. Such immunity is not to protect wayward judges, but rather to protect the public, in whose interest it is that

judges should be at liberty to exercise their functions with independence and without fear of consequences. See Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). See also Agnew v. Moody, 330 F.2d 868, 869 (9th Cir. 1964).'"

In view of our conclusion that the doctrine of judicial immunity applies here and precludes plaintiff from recovering damages from any of the defendants, we need not discuss plaintiff's claim that Judge Arnold was substituted as a Doe defendant in a proper and timely manner.

The order and judgment appealed from are affirmed.

WE CONCUR:

Rouse, Acting P.J.

Miller, J.

Smith, J.